

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
<i>Review of the Section 251 Unbundling</i>	)	
<i>Obligations of Incumbent Local Exchange</i>	)	CC Docket No. 01-338
<i>Carriers</i>	)	
	)	
<i>Implementation of the Local Competition</i>	)	
<i>Provisions of the Telecommunications Act of</i>	)	CC Docket No. 96-98
<i>1996</i>	)	
	)	
<i>Deployment of Wireline Services Offering</i>	)	CC Docket No. 98-147
<i>Advanced Telecommunications Capability</i>	)	
	)	

**REPLY COMMENTS OF THE  
 NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

The National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits these reply comments to the Notice of Proposed Rulemaking ("*Notice*" or "*Triennial Review*") issued by the Federal Communications Commission ("Commission" or "FCC") in the above-captioned proceedings.<sup>1</sup> At least 23 States have indicated that they have already or will be filing reply comments in this proceeding specifically endorsing various NARUC positions articulated in our initial comments. NARUC has not had an opportunity to review in detail all of the State filings, but as of today, at least 17 States indicated they were filing/had filed reply comments that specifically endorse either NARUC's proposal for a Joint Conference, or some additional procedures,<sup>2</sup> to assure adequate State input in the FCC's deliberations is in the public interest.

<sup>1</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-92, 96-98 and 98-147, Notice of Proposed Rulemaking, FCC 01-361 (rel. Dec. 20, 2001) ("*Notice*").

<sup>2</sup> The Florida PSC does not endorse a Joint Conference but does suggest in its reply comments that, at a minimum, the FCC should have a series of State-Federal workshops.

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Moreover, every single NARUC member commission that had the resources to file separate comments strongly agree that States should retain the ability to modify any national list, regardless of any FCC determinations about existing elements or the status of the national list.

### DISCUSSION

NARUC raised 5 specific concerns in its initial comments. Easily the two most critical of those concerns were (1) its request for the FCC to immediately convene a Joint Conference and (2) its focus on the need to retain the State's flexibility to modify any national list of elements or to require more elements that the FCC may suggest. Both are underscored by the FCC's own statements, a recent court of appeals decision, the State experience to date, and the text of the legislation itself.

As we noted in our initial comments, Congress gave State regulators a critical role in implementing the UNE regime. NARUC's members arbitrate the UNE provisions in interconnection agreements, establish UNE prices, and formally and informally adjudicate UNE disputes between ILECs and competitive carriers. As a result, State regulators' experiences and perspectives on the UNE regime are invaluable to any effort to determine which UNEs satisfy the "impair" standard in §251(d)(2). Additionally, *State regulators have direct knowledge of the critical role that correct UNE pricing plays in the development of competitive markets and have already found, in several instances, that the unbundling requirements imposed in the UNE Remand decision and subsequent FCC orders were simply insufficient to enable competition to flourish in the markets in their home jurisdictions.*<sup>3</sup>

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<sup>3</sup> For example, on March 27, 2002 the New York PSC approved an incentive regulation plan for Verizon that makes the UNE platform available to business POTS customers throughout New York state, with the exception of specifically designated central offices in New York City where a customer uses 18 lines or less at a specific location. *Proceeding on Motion of the Commission to Consider Cost Recovery by Verizon and to Investigate the Future Regulatory Framework*, Case 00-C-1945; *Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, Case No 98-C-1357; *Order Instituting Verizon*

Indeed, given the Act's purpose to ensure that the UNE regime will promote competition for *local telecommunications services*, the direct involvement of State regulators with jurisdiction over such local services seems indispensable to any meaningful three-year UNE review. In crafting Section 252 to outline the role to be played in formulating interconnection agreements and implementing the substantive duties of ILECs contained in Section 251, Congress refers *forty-five* times to the "State Commission," with four such references contained in the subsection headings. See 47 U.S.C. § 252 (2002). And reviewing the substantive provisions of that section, it is evident that Congress envisioned a substantial role for State commissions in implementing the local competition provisions of the Act. This Congressional

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*Incentive Plan*, (February 27, 2002). The NYPSC specifically noted that providing CLECs greater access to business customers through the UNE Platform "will significantly enhance the conditions for local competition in New York." *Id.*, page 3. In Texas, the PUC concluded that the switch port should be available on a non-restricted basis throughout Texas, rejecting the unbundled local switching restrictions mandated by the FCC's UNE Remand decision. *Petition of MCI Metro Access Transmission Services LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996*, Docket No. 24542, adopted on April 5, 2002. "[T]he Arbitrators decline to rely solely on the FCC's determination regarding ULS. Instead, the Arbitrators independently find that CLECs would be impaired in zones 1, 2, and 3 in Texas if local switching were not available as a UNE. Therefore, even if in its Triennial UNE Review proceeding the FCC were to remove local switching from the national list, or create a new exception standard, the Arbitrators nonetheless find that on this specific final record CLECs in Texas would be impaired without the availability of local switching on an unbundled basis." *Id.* page 7. The Illinois Commerce Commission required SBC/Ameritech to offer its Project Pronto architecture as an end-to-end high frequency portion of the loop ("HFPL") UNE. *Illinois Bell Telephone Company Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service*, 00-0393, *Order on Rehearing*. After applying the FCC's necessary and impair test, the ICC determined that CLECs would be impaired without access to SBC's network on an unbundled basis. More specifically, the ICC determined that the broadband and broadband/voice resale products created by the Commission's Project Pronto Waiver Order were not sufficient to provide competitors a meaningful opportunity to compete. California, Kansas and Indiana have investigations into this issue also. Indeed, the Wisconsin PSC imposed similar unbundling requirements on Project Pronto in a March 22, 2002 Order, finding that competitors will be impaired pursuant to Section 251(d)(2) if they are required to collocate a DSLAM at a remote terminal to provide DSL and if they are only provided access to Ameritech's resale offerings across the Project Pronto architecture. *Investigation into Ameritech Wisconsin's Unbundled Network Elements*, 6720-T1-161. Compare, (1) the Texas PUC decision finding a stand-alone splitter is a feature and functionality of the loop. *Petition of Southwestern Bell Telephone Company for Arbitration with AT&T Communications of Texas, L.P., TCG Dallas, and Teleport Communications, Inc. Pursuant to Section 252(b)(1) of the Federal Telecommunications Act of 1996*, Docket No. 22315 at 9 (March 14, 2001); (2) The April 3, 2002, Tennessee Regulatory Authority order requiring BellSouth to provision splitters to CLECs for use in line-splitting arrangements, even though the FCC does not require provision of this equipment – and imposing a requirement for BellSouth to install, for CLEC use, dual purpose line cards in fiber-fed next general digital loop carrier deployed at the remote terminal, a requirement that also exceeds the FCC's current unbundling requirements; and See, *First Initial Order*, TRA Docket No. 00-00544, *In Re: Generic Docket to Establish UNE Prices for Line Sharing Per FCC 99-355, and Riser Cable and Terminating Wire as Ordered in TRA Docket 98-00123*, pages 25 & 42 (April 3, 2002). (3) the April 23, 2002 Florida PSC order finding BellSouth cannot refuse to provide retail DSL to customers who obtain their voice services from CLECs via unbundled loops.

intent, and the States experience to date operating under the existing regime, strongly supports the FCC's initial findings that States should be allowed to modify any national list to add elements based on local conditions. The fact that Congress clearly intended, and States have already, played an FCC-acknowledged integral role in implementing Section 252 also provides clear evidence of the need for close State-FCC collaboration before any final Commission order is issued.

NARUC appreciates the FCC's interest in the Joint Conference Proposal.<sup>4</sup> Given the critical role played by State regulators in implementing the statutory UNE regime, as well as the intensive data- and State-specific nature of the three-year review, NARUC reiterates its request for the FCC to immediately establish a Joint Conference as the formal mechanism to secure the State participation necessary for an informed application of the statutory "necessary" and "impair" standards.

NARUC respectfully submits that the recent *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*") strongly supports favorable action on NARUC's key requests to assure States retain the flexibility to require UNEs needed in their respective markets and to establish a Joint Conference. NARUC is aware the FCC filed a petition for rehearing of this decision. However, regardless of the result in any further review proceedings, NARUC believes, if the FCC is willing to proceed with a Joint Conference, the agency can discharge its statutory role in establishing UNEs and accomplish its policy objectives in a manner that passes muster under the *USTA* decision.

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<sup>4</sup> In ¶ 76 of the *Notice*, the FCC "seeks comment on a proposal to convene a Federal State Joint Conference on UNEs pursuant to [§] 410(b)." In ¶ 75 of the *Notice*, the FCC "...recognize[s] that State commissions may be more familiar than the [FCC] with the characteristics of markets and incumbent carriers within their jurisdictions, and that entry strategies may be more sophisticated in recognizing regional differences."

By continuing the proceeding, via the Joint Conference process, the FCC can expeditiously provide much-needed regulatory certainty and finality to issues that have been in flux for almost six years.

In any case, the *USTA* decision should cause the FCC to more closely examine the NARUC's recommendations for continued State flexibility vis-à-vis requiring specific UNEs based on conditions in the particular State. The most visible aspect of the *USTA* decision is its focus on particular markets.<sup>5</sup> The *USTA* Court consistently found it could not assess the legal support for a universal unbundling approach "because the [FCC] has loftily abstracted away all specific markets . . ." *Id.* at 423.<sup>6</sup>

To formulate a defensible method for determining UNEs under the *USTA* decision, the FCC needs to craft a methodology that allows for consideration of specific markets and customer classes. NARUC believes there is no practical way for the FCC itself to apply any UNE "necessary and impair" standard to customer classes and geographic markets across the nation. We believe Congress intended for the FCC to do what it already has effectively done in its current regulations. For example, by explicitly reiterating the critical role State commissions have already played utilizing FCC-specified flexibility to modify the national list, the FCC can further specify that its rules rely on the State commissions to make any market specific findings and determinations suggested by the *USTA* decision.

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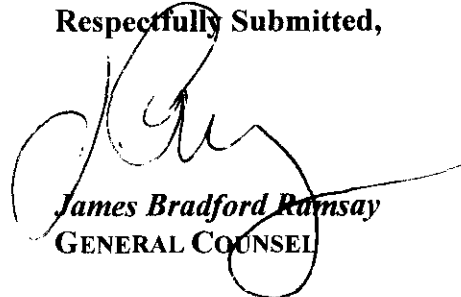
<sup>5</sup> Indeed, the Court started its entire discussion of the UNE list by stating: "As to almost every element, the Commission chose to adopt a uniform national rule, mandating the element's unbundling in every geographic market and customer class, *without regard to the state of competitive impairment in any particular market*. As a result, UNEs will be available to CLECs in many markets *where there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have the object of Congress' concern*." *USTA*, 290 F.3d at 422 (emphasis added).

<sup>6</sup> See also *Id.* at 426 (where the Court again characterized the FCC's unbundling findings as being "detached from any specific markets or market categories").

**CONCLUSION**

The FCC and the State commissions have taken several significant steps toward deregulation of the local exchange carriers and increasing competition in telecommunications services and should work together to continue these efforts. For the foregoing reasons, NARUC respectfully reiterates its request that the FCC immediately create a UNE Joint Conference to facilitate additional joint activity. In any case, it is imperative States retain authority to impose additional unbundling obligations on ILECs and that FCC action in this proceeding does not undermine existing and future State proceedings.

**Respectfully Submitted,**



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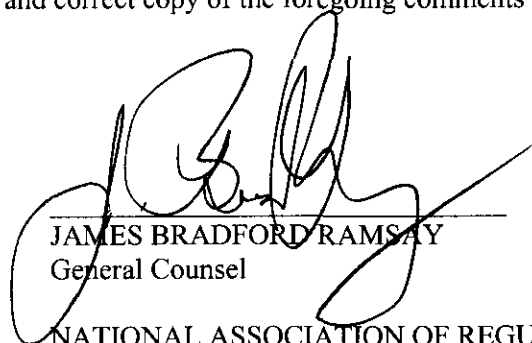
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	)	

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing comments will be mailed to  
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